No. 94-631, 94-797, 94-929

FILED
FEB 21 1995

In The

Supreme Court of the United States

October Term, 1994

ZELL MILLER, et al., *Appellants,*

v.

DAVIDA JOHNSON, et al., *Appellees,*

UNITED STATES OF AMERICA, *Appellant,*

v.

DAVIDA JOHNSON, et al., *Appellees,*

LUCIOUS ABRAMS, JR., et al., *Appellants,*

v.

DAVIDA JOHNSON, et al., *Appellees.*

On Appeal From The United States District Court For The Southern District Of Georgia

BRIEF OF *AMICUS CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF APPELLANTS

NICHOLAS DEB. KATZENBACH*
906 The Great Road
Princeton, New Jersey 08540
(609) 924-8536

ALAN E. KRAUS
JEFFREY M. SIMINOFF
BARBARA L. FARRICKER

RIKER, DANZIG, SCHERER, HYLAND & PERRETTI
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981
(201) 538-0800

MICHAEL A. COOPER, Co-Chair
HERBERT J. HANSELL, Co-Chair
BARBARA R. ARNWINE
THOMAS J. HENDERSON
BRENDA WRIGHT
J. GERALD HEBERT

Lawyers' Committee for Civil Rights Under Law
1450 G Street, N.W.
Washington, D.C. 20005
(202) 662-8600

Counsel for Amicus Curiae

*Counsel of Record

February 21, 1995

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTIONS PRESENTED

1. Whether a congressional district that is not bizarre on its face and whose district lines, as established by the evidence at trial, comport with traditional districting principles is, nevertheless, subject to strict scrutiny analysis under the Equal Protection Clause of the Fourteenth Amendment if race was the substantial or motivating factor in the creation of the district at issue.

2. Whether remedying past discrimination in voting is a compelling justification for a state to engage in race-conscious redistricting.

3. Whether the district court correctly held that compliance with Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, is a compelling state interest sufficient to justify race-conscious redistricting *only if* the resulting district lines were "actually necessary" to comply with the Voting Rights Act, based on a *post hoc* review of the correctness of the Attorney General's Section 5 determination.

4. Whether the district court erred in ruling that the Eleventh District failed to satisfy the narrow tailoring prong of strict scrutiny analysis because it was not "necessary" to draw that District in the precise configuration employed by Georgia.

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INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") submits this brief as *amicus curiae* with the consent of the parties in support of appellants' argument that the Eleventh District of Georgia's 1992 congressional redistricting plan does not violate the Equal Protection Clause of the Fourteenth Amendment. Protection of the voting rights of minorities is an important aspect of the Lawyers' Committee's work, as demonstrated by its frequent appearances before this Court in various voting rights cases since the adoption of the Voting Rights Act in 1965.

The Lawyers' Committee was formed in 1963 at the request of President Kennedy to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Lawyers' Committee has frequently represented black citizens in voting rights cases before this Court, including *Clark v. Roemer*, 500 U.S. 646 (1991), *Clinton v. Smith*, 488 U.S. 988 (1988), and *Connor v. Finch*, 431 U.S. 407 (1977), and has appeared as *amicus curiae* in other significant voting rights cases in this Court, including *Shaw v. Reno*, 509 U.S. ___, 113 S. Ct. 2816 (1993).

STATEMENT OF THE CASE

On January 13, 1994, appellees, who are white residents of Georgia, filed suit alleging that Georgia's Eleventh District in its 1994 redistricting plan violated the Equal Protection Clause of the Fourteenth Amendment. Following a seven-day trial, a three-judge district court,

over a dissent by Judge Edmondson, issued a *per curiam* opinion holding that the Eleventh District was subject to strict scrutiny under the Equal Protection Clause and failed that standard. *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994).

In its opinion, the district court excoriated the Department of Justice (the "Department" or "DOJ") for accepting input from black legislators represented by the American Civil Liberties Union ("ACLU") and other sources. *See id.* at 1368 ("Succinctly put, the considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment."). The district court further chastised the Department for, in the majority's view, improperly seeking to ensure proportional representation for black citizens of Georgia. *Id.* at 1379, 1385-86.

With regard to the applicability of the strict scrutiny standard, the district court held that, whether or not the Eleventh District was "bizarre" in shape, it was nevertheless subject to strict scrutiny if "race was the *substantial or motivating consideration* in creation of the district in question." *Id.* at 1372 (footnote omitted). The court then found that race was such a factor in the design of the Eleventh District, allegedly because Georgia sought to comply with demands by the ACLU and the Department for a third majority-minority district. *Id.* at 1375-78.

With regard to the application of the strict scrutiny standard, the district court held that, in order to establish a compelling justification for its use of race in drawing district lines, the state had to prove, not only that it reasonably believed that the creation of the Eleventh

District was necessary to comply with the Voting Rights Act and to obtain preclearance from DOJ, but also that it was "actually necessary" to structure the Eleventh District's lines as drawn in order to comply with the Act. *Id.* at 1382, 1383. The district court then found that the Eleventh District was not "necessary" and, hence, was unconstitutional. *Id.* at 1393.

SUMMARY OF ARGUMENT

In *Shaw v. Reno*, 509 U.S. ___, 113 S. Ct. 2816 (1993), this Court held that a congressional district could be so "bizarre" in its shape as to raise, presumptively, a question under the Equal Protection Clause. That threshold question is, in this Court's words, whether the district in question is "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that [such] segregation lacks sufficient justification." *Id.* at ___, 113 S. Ct. at 2832. If, and only if, this "allegation of racial gerrymandering remains uncontradicted, the District Court must determine whether the . . . plan is narrowly tailored to further a compelling governmental interest." *Id.*

Thus, *Shaw* holds that, presumptively, race alone is not a proper basis to draw district lines. That does not mean, however, that a state cannot consider race, along with other factors, in drawing district lines. It means only that if the district lines are so bizarre as to suggest that race alone, without regard to traditional redistricting principles, led to their design, and the state cannot rebut

that suggestion or satisfy strict scrutiny standards, then the district at issue is unconstitutional. But a state can consider race as a significant factor in drawing district lines so long as it does not ignore all other relevant factors.

Simply put, *Shaw* did not overrule *United Jewish Organizations of Williamsburgh v. Carey*, 430 U.S. 144 (1977) (plurality opinion) ("*UJO*"). Instead, *Shaw* cautions that race-conscious redistricting must consider other relevant potential concerns; race cannot be the only justification for district lines.

The district court erred by assuming that *Shaw* justifies or warrants a detailed inquiry into legislative motives in drawing district lines and, if race was "the substantial or motivating consideration," then strict scrutiny applies. By its very terms, *Shaw* applies only to districts that are objectively bizarre; *Shaw* does not authorize district courts across the country to engage in the weighing of legislative intent in the absence of vote dilution or truly bizarre district shape, especially under such amorphous standards as "substantial" or "motivating." Particularly in light of the myriad of political compromises that go into the approval of any redistricting plan, it is simply unworkable and inappropriate to require courts to divine the intent of the legislature as a whole as a precondition for upholding a plan.

Properly read, *Shaw* requires an objective test of the "bizarreness" of the district lines at issue to determine if it appears that race was the only factor in their creation. Where, as here, that is not so, because the district is consistent with traditional districting principles, or with

other districts in the plan or with historical districts, the inquiry ends. Race-conscious redistricting, so long as it does not ignore all other factors, is not illegal in the absence of any dilutive effect.

Moreover, even if the Eleventh District were subject to strict scrutiny review, the district court erred in its application of that standard. A state's reasonable belief that it must draw one or more majority-minority districts in order to comply with the Fifteenth Amendment or the Voting Rights Act is a sufficiently compelling justification for race-conscious districting, whether or not that belief ultimately, in the district court's judgment, turns out to be correct. To hold otherwise would say to states that their attempts to comply voluntarily with constitutional and statutory mandates or to cooperate with the Department are at their peril, subject to picayune second-guessing by the courts.

Indeed, for states subject to Section 5 of the Voting Rights Act, the district court's holding requires them not only to obtain DOJ preclearance, but also to evaluate whether the Department's views are not just reasonable but also whether they will be found to be actually correct by a three-judge district court. That holding goes far beyond this Court's precedents on the "strong basis in evidence" necessary to justify racial remedial actions. Moreover, for a Georgia district court to judge the Department's position in that way flies in the face of the Voting Rights Act itself, which provides that only the District of Columbia District Court has jurisdiction to review DOJ's preclearance decisions.

Furthermore, the district court's harsh attacks on the Department, the ACLU, and black legislators for their communications concerning Georgia's proposed redistricting plans are unwarranted and misguided. The Department's regulations specifically encourage the receipt of information from outside sources, including minority citizens and their representatives, and such input is frequently essential given the Department's lack of field staff and limited investigatory resources. Indeed, it would be highly undesirable to require the Department to base its Section 5 determinations on only that information which the submitting jurisdiction chooses to provide. Black citizens in Georgia are rightfully bewildered to find the federal courts angrily denouncing civil rights lawyers for advocating, and the Department for considering, their views.

In sum, as long as the Department's preclearance decision was not insupportable, or the state's decision that a majority-minority district was necessary to comply with Section 2 of the Voting Rights Act was reasonable, then there is a sufficiently compelling justification to engage in race-conscious redistricting. That standard was amply met below.

Finally, the district court employed an incorrect legal analysis in holding that the Eleventh District was not narrowly tailored, because that court did not adequately consider the significant differences between race-conscious redistricting and other types of race-conscious state action. As the court held in *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994) (three-judge court), *juris. statement filed*, 63 U.S.L.W. 3439 (U.S. Nov. 21, 1994) (No. 94-923), any application of the narrow tailoring standard

to voting rights cases must take into account the difference between the consideration of group characteristics that necessarily determine district lines and the individual rights at issue in such cases as *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). Application of the narrow tailoring standard to voting rights cases must also consider this Court's traditional deference to the autonomy of the states in redistricting decisions.

ARGUMENT

I. GEORGIA'S ELEVENTH DISTRICT IS NOT SO BIZARRE AS TO REQUIRE STRICT SCRUTINY OR TO CONFER STANDING UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. Strict Scrutiny Is Appropriate Only Where The District Is So Bizarre On Its Face As To Suggest That Race Was The Only Factor In Its Creation

In *Shaw v. Reno*, this Court held that "[i]n some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race." 509 U.S. at ___, 113 S. Ct. at 2826 (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960)). In those exceptional cases, a district can be so "bizarre" on its face that "it rationally can be viewed only as an effort to segregate the races for the purposes of voting, without regard for traditional districting principles and without sufficient compelling justification." *Id.* at ___, 113 S. Ct. at 2824.

This Court did not, however, hold in *Shaw* that race-conscious redistricting that was not "bizarre" is subject to constitutional challenge. To the contrary, the *Shaw* Court expressly approved the appellants' concession there that race-conscious redistricting is not *per se* unconstitutional because "[t]his Court never has held that race-conscious decisionmaking is impermissible in *all* circumstances." *Id.* at ___, 113 S. Ct. at 2824. Indeed, this Court has recently accepted the concept of race-conscious redistricting in, among other cases, *Johnson v. De Grandy*, ___ U.S. ___, 114 S. Ct. 2647 (1994). *See also UJO*, 430 U.S. 144.

There is, of course, no way around that conclusion because, given the demographic information available to legislators in drawing district lines, race-*unconscious* districting is impossible. As the *Shaw* Court recognized,

> [R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.

509 U.S. at ___, 113 S. Ct. at 2826; *see also Wright v. Rockefeller*, 376 U.S. 52 (1964) (creation of majority-minority districts using traditional districting principles held constitutional).

In short, *Shaw* most certainly does not hold that race-conscious redistricting is unconstitutional; *Shaw* holds only that district lines that are so irregular that race

appears to be their *only* explanation may be unconstitutional if the state does not identify other factors considered or provide a compelling justification.

The district court below went far beyond that narrow holding. The district court found that, even if the district lines in question were entirely regular, a district may be subject to strict scrutiny if race was the "substantial or motivating consideration" in the drawing of the district lines. *Johnson*, 864 F. Supp. at 1372. That holding was wrong.

As an initial matter, it is difficult enough to determine what language in a statute means by referring to printed legislative histories. It is extremely problematic to determine at a trial how important a factor race was in approving a particular redistricting plan. As just two examples, a legislator whose own district was safely drawn in another corner of the state may have cared not at all whether the Eleventh District was majority-black or majority-white so long as his district was inviolate. Another legislator whose district bordered the Eleventh District may have been equally indifferent to the racial make-up of the Eleventh District so long as the common border with his district remained unchanged. Given the many political compromises that go into the approval of any redistricting plan, it would be unworkable to predicate a plan's constitutionality on a court's after-the-fact calibration of precisely how important race was to legislators' approval of the plan.[1] *See, e.g., Village of Arlington*

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[1] Indeed, the district court itself recognized that "legislative intent is notoriously difficult – if not logically impossible –

Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 268 n.18 (1977) (acknowledging the difficulty in assessing the decisional motivations of a legislative body, particularly in light of legislative privilege and the problems created by the substantial intrusion that judicial inquiry into legislative or executive motivation represents). This is particularly true if the constitutional standard is not predicated on a showing of discriminatory effect based on a concrete injury, such as dilution of voting strength.

Moreover, the notion that race as a substantial consideration is enough to submit a majority-minority district to constitutional challenge would mean that every majority-minority district in this country would be subject to such a claim. The district courts would be flooded with such litigation every ten years. Indeed, majority-white districts might be just as open to challenge: legislators are every bit aware of the racial consequences when they draw a majority-white district as when they draw one that is majority-black.

Logic alone compels the conclusion that the district court's intent standard is unworkable. Consider the following two hypotheticals: assume a state entitled to eight members of Congress with a population 75% white and 25% black. If that population were randomly distributed throughout the state, and it was not possible to draw a contiguous majority black district, one would expect each district to be 75% white and 25% black. *Shaw* states that strict scrutiny would apply to weirdly shaped district

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to ascertain." *Johnson*, 864 F. Supp. at 1374 (citing *Rogers v. Lodge*, 458 U.S. 613, 631-53 (1981) (Stevens, J., dissenting), and *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring)).

lines (which these hypothetical facts would require) drawn simply to ensure two black majority districts.

Assuming, however, the same racial breakdown with black citizens concentrated in discrete parts of the state, it would not be surprising if one or more districts were majority black. In fact, for states subject to Section 5 of the Voting Rights Act because of prior discrimination, district lines which did not result in one or more majority-minority districts could well be suspect and unlikely to obtain DOJ preclearance. Nevertheless, the intentional creation of even one majority black district in a state with these facts would be subject to strict scrutiny analysis if drawn intentionally, under the district court's holding. That makes no sense.

In sum, contrary to the district court's underlying assumption below, race-conscious redistricting is both necessary and beneficial, so long as it also considers other traditional districting principles as required by *Shaw*. As *Shaw* itself points out, this country has a long and unhappy history of race discrimination which cannot be ignored. If we are some day to become the color blind society to which we aspire, we ignore that history at our peril. Voting should be color blind, but it is not as yet. It will become so only if blacks do not feel discriminated against as voters by being kept in minority status, unlikely or unable to elect representatives of their own race. It will become so only if some blacks are in fact elected to political office where they can make their views known to white officeholders and impress white voters with their competence. "The opportunity to hold office and to make a record while in office is perhaps the most

important means whereby minority candidates can establish a reputation that will earn them considerable cross-over support. . . . [M]inority politicians are often able to get started because of majority-minority districts." BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 136-37 (Cambridge Univ. Press 1992). Moreover, a legislature with some minority members is obviously less likely to discriminate in its legislation.

Shaw is consistent with this analysis. It simply adds an important caution. It says that it is wrong to distort the normal political process by creating a majority-black district where to do so requires ignoring essentially all other relevant considerations.

Measured by that standard, the Eleventh District is plainly not bizarre or suspiciously irregular. As Judge Edmondson discussed below in his dissent:

> 1. The size of the district is not particularly noteworthy. . . .
>
> 2. The district's 1,184 miles of borders is not distinctive when compared to the Second (1,243 miles) or the Eighth (1,155 miles) Districts.
>
> 3. Plaintiffs claim that the district is bizarre because it comes within 58 miles of crossing the entire state. But, the Ninth District spans the entire northern border of the state and the First, Second and Eighth Districts begin at the Florida border and stretch north to almost the middle of the State.
>
> 4. The Eleventh District shows considerable respect for existing political boundaries. . . .

> 5. In addition, eighty-three percent of the Eleventh's area comes from whole counties. . . .
>
> 6. Georgia's congressional districts have no tradition of being neat, geometric shapes. . . .
>
> 7. That the Eleventh District splits eight counties is unremarkable. . . . Splitting counties in Georgia's congressional districts for reasons wholly unrelated to race is part of Georgia's history. . . .
>
> 8. Qualitative measurements for compactness, such as perimeter and dispersion measurements, show the Eleventh District is not bizarre or highly irregular. . . .

864 F. Supp. at 1396-97 (Edmondson, J., dissenting).

Whatever visceral reaction one might have to the design of the Eleventh District on a map, as Judge Edmondson's dissent makes clear, further analysis proves beyond any reasonable doubt that it is not bizarre in the context of Georgia's redistricting plan. That should be the end of the analysis under *Shaw*.

B. Because The Eleventh District Is Not Bizarre In Shape, White Voters Lack Standing To Challenge It On Equal Protection Grounds

Under *Shaw*, in those exceptional circumstances where there is demonstrable proof that a majority-minority district is so bizarre in shape as to suggest that race was the only factor in its creation, then white voters may have standing to assert an Equal Protection challenge. As the *Shaw* Court explained:

> [R]eapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters in other ways. It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole.

509 U.S. at ___, 113 S. Ct. at 2828.

Absent those exceptional circumstances – that is, absent the presumption, based on a showing of a bizarre district shape, that race was the only factor considered in drawing the district lines at issue – it is and should be virtually impossible for a voter to show sufficient harm to acquire Equal Protection standing.[2] Obviously, the fact that a district has a white or black majority is not enough. *See UJO*, 430 U.S. at 162-63; *Wright*, 376 U.S. at 516. Even the fact that the district was knowingly so designed is not enough, since racial composition is always known and taken into account, along with other group-related factors, in drawing district lines. Indeed, given our history

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[2] This Court has consistently held that a federal court may only decide a constitutional challenge to a legislative act when asked to do so by a plaintiff who can demonstrate that he or she has personally suffered, or is in imminent danger of suffering, an actual, concrete injury that is "fairly traceable" to the challenged legislative act and is likely to be redressed by the relief sought. *See Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S. Ct. 2130, 2136 (1992); *see also Allen v. Wright*, 468 U.S. 737, 750-55 (1984) (black plaintiffs lack standing to challenge tax benefits for racially discriminatory private schools by alleging "stigmatic injury" resulting from governmental action).

of racial discrimination, lines which created a narrow white majority where a black majority was equally feasible would almost surely be suspect.

This Court has consistently held that, in cases where race was a factor but not the only factor, in drawing district lines, challengers must demonstrate that the redistricting plan operates to minimize or cancel out the voting strength of the racial group as a whole. *See, e.g., White v. Regester*, 412 U.S. 755 (1973) (in state legislative reapportionment plan, relatively minor population deviations among districts did not substantially dilute the weight of individual votes so as to deprive voters of fair and effective representation); *Whitcomb v. Chavis*, 403 U.S. 124 (1971) (holding that plaintiffs' burden is to establish that the political process is not equally open to participation by the group in question and that its members had less opportunity than did residents in the district to participate in the political processes and to elect legislators of their choice). In the context of an Equal Protection challenge to race-conscious redistricting, this Court expressly held in *UJO* that as long as whites "as a group, [are] provided with fair representation, we cannot conclude that there was a cognizable discrimination against whites or an abridgment of their right to vote on the grounds of race." 430 U.S. at 166.

There is no question that *Shaw* eased the requirements of proving injury through vote dilution where proof of a bizarre district shape is shown. But it certainly did not suggest, as the district court below would have it, that any time race is a factor in redistricting, standing exists. The importance of the requirement of a bizarre shape that defies, on its face, any explanation other than

race alone, is therefore critical to the threshold standing issue – unless this Court means to overrule decades of voting rights precedents and to open the floodgates for voting rights litigation. *Shaw* does not require, or sanction, such a result. Nor should this Court change settled precedent to allow such a result.

II. EVEN UNDER A STRICT SCRUTINY ANALYSIS, GEORGIA HAD A COMPELLING JUSTIFICATION TO ADOPT THE ELEVENTH DISTRICT

Even assuming that strict scrutiny were warranted here, the district court erred in its application of strict scrutiny to this voting rights case. The district court assumed that the only possible compelling justification for race-conscious redistricting is compliance with the Voting Rights Act. The district court further held that Georgia's motive to comply with the Act and to obtain DOJ preclearance under Section 5 is only sufficient if the resulting district was "actually necessary" to comply with the Voting Rights Act. *Johnson*, 864 F. Supp. at 1382. And then, acting as if it were the District Court for the District of Columbia, it reviewed the Department's judgments and Georgia's redistricting plan and concluded the plan was not "actually necessary" because it did more than was absolutely required to comply with the Act.

The district court was wrong on all counts. *First*, the district court's analysis ignores a state's political interests in taking into consideration in drawing district lines the views of a minority population that has been the victim of discrimination and racially polarized voting. That interest is no less important because the minority is

defined by race rather than religion, or sex, or political party.

Second, as this Court has often recognized, a state's interest in remedying the effects of its own past or present racial discrimination is sufficiently compelling to support race-based remedial action, with or without the incentive of a statute such as the Voting Rights Act. *See Croson*, 488 U.S. at 491-93 (plurality opinion); *id.* at 518 (Kennedy, J., concurring); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 276, 280-82 (1986) (plurality opinion); *id.* at 286 (O'Connor, J., concurring). Furthermore, this Court has held that a state need not await a judicial finding of discrimination before undertaking affirmative action, so long as it has a "strong basis in evidence" for concluding that such remedial action is "necessary." *Croson*, 488 U.S. at 500; *Wygant*, 476 U.S. at 277. In short, whether or not the Voting Rights Act ever existed, Georgia has a compelling justification – indeed, an obligation – to remedy its own history of discrimination against blacks in voting (and every other phase of life), and to ensure that that history is not repeated today.

Georgia plainly has a strong basis in evidence to believe that it was guilty of racial discrimination in voting in the past which justifies remedial action today. Indeed, the mere fact that Georgia is subject to Section 5 of the Voting Rights Act, which requires states or other political subdivisions to obtain preclearance of any changes in voting procedures *because* they discriminated against minorities in voting in the past, is compelling proof on that score. *See McCain v. Lybrand*, 465 U.S. 236, 244-45 (1984) (Section 5 coverage is based on findings of a state's violations of the Fifteenth Amendment). Moreover,

Georgia's history of racial discrimination in voting is well-documented. Even the district court below found that it could take judicial notice of Georgia's past discrimination in voting. *Johnson*, 864 F. Supp. at 1379; *see also Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982) (three-judge court), *aff'd*, 459 U.S. 1166 (1983).

And *third*, the Voting Rights Act, in any event, provides a compelling justification for race-conscious redistricting. Indeed, the *Shaw* Court itself specifically confirmed that states "have a very strong interest in complying with [the Voting Rights Act], at least to the extent it is constitutionally valid as interpreted and as applied." 509 U.S. at ___, 113 S. Ct. at 2830.

Voluntary compliance with a state's obligation to remedy past discrimination and with the Voting Rights Act is, of course, to be encouraged. In fact, the whole purpose and administrative scheme of that Act is intended to encourage voluntary compliance. H.R. REP. No. 397, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 3277, 3284; *see Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).

Simply put, so long as a state has a reasonable basis to believe that the inclusion of one or more majority-minority districts within its redistricting plan is necessary to comply with the Voting Rights Act, that belief is sufficient to provide a compelling justification for race-conscious redistricting. *Compare Croson*, 488 U.S. at 500 (evidence "approaching a *prima facie* case of a constitutional or statutory violation"); *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring) ("demonstrable evidence . . . sufficient to support a *prima facie* Title VII . . . claim");

see also Johnson v. Transportation Agency, 480 U.S. 616, 650-52 (1987) (O'Connor, J., concurring) (evidence sufficient for a "Title VII *prima facie* case").

Here, of course, that "reasonable basis" is amply supplied by the Department's refusal to preclear Georgia's first two redistricting plans which included only two majority-minority districts. The DOJ was given a role by Congress which recognizes its expertise in matters of race and requires that its administrative expertise be given proper respect and deference. The district court's refusal to accept the significance of the Department's decision not to preclear Georgia's first two plans reflects an open hostility to the Department that cannot be squared with the Department's duties under the Voting Rights Act. Indeed, the district court's vituperative attacks on the Department for its use of sources other than Georgia's Attorney General and the Department's supposed cooperation with the ACLU are, frankly, difficult to fathom. The Department has to review literally thousands of voting changes, with a limited staff and budget. *See Clark v. Roemer*, 500 U.S. 646, 657-58 (1991). It necessarily must rely on assistance from outside sources and it would not make sense to limit those sources to the party seeking preclearance. Without impugning the good faith of the Georgia Attorney General, it is hardly reasonable to expect the advocate for a redistricting plan to be entirely objective about its merits. For all those reasons, the Department's own Section 5 regulations have long encouraged the solicitation of the views of minority legislators and citizens, as well as those of their white counterparts. *See, e.g.*, 28 C.F.R. §§ 51.28(h), 51.29, 51.38 (1994).

The fact that the Department seeks such input is well known to Congress also – which has never objected to that process. *See, e.g.*, S. REP. NO. 97-417, 97th Cong., 2d Sess. 49 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 227 ("In fact, jurisdictions can and do informally discuss proposed changes in advance with the Department. The Department suggests that minority input be obtained and notes what factors must be taken into account to ensure that a change is acceptable."); *Hearings on S. 407, 903, 1297, 1409, and 1443 before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 9 (1975) (statement of Hon. Hugh Scott, U.S. Senator from Pennsylvania) ("[s]ome of the submissions have already been modified after informal discussions with the Department's representatives, or changes are negotiated after submission. . . . In Georgia, the initial redistricting plan for Atlanta would have made it more difficult for Congressman [Andrew] Young's candidacy, but substantial changes were required by the Department as a condition of approval.").[3]

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[3] During congressional hearings on the various extensions of Section 5, numerous representatives of civil rights organizations, including the director of the ACLU's Southern Regional Office, described their "common practice" of communicating with the Department of Justice concerning pending Section 5 submissions. *Hearings on Extension of the Voting Rights Act Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 747 (1981) (colloquy between Laughlin McDonald and Congressman Donald Edwards); *id.* at 931-32 (testimony of Joaquin Avila, Mexican American Legal Defense & Educational Fund, Inc., describing advocacy in Section 5 administrative preclearance process). Black state legislators testifying in support of Section 5 have also described, during congressional hearings, their efforts to

Thus, regardless of its sources of information, the DOJ's refusals to preclear Georgia's first two redistricting plans were certainly sufficient to provide Georgia with a compelling justification to add a third majority-minority district. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978) (Powell, J.) (Section 5 objection by DOJ is properly viewed as "an administrative finding of discrimination" which is sufficient to justify race-based remedial action).

The district court incorrectly held that any justification supplied by the state's efforts to comply with the Voting Rights Act and DOJ's preclearance requirements evaporates once the court, *ex post facto*, concludes that the district at issue is not as narrowly tailored as possible.

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secure Justice Department objections to discriminatory legislative enactments. *Id.* at 383-84 (testimony of L. Douglas Wilder, Virginia State Senator, discussing ongoing effort to secure Justice Department objection to Virginia legislative redistricting plan); *see also Hearings on S. 818, 2456, 2507 and Title IV of S. 2029 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st and 2nd Sess. 398 (1969 and 1970) (testimony of Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights) (noting that Department of Justice, in determining whether a submitted law has a discriminatory effect or purpose, obtains information from "the local election officials, from civil rights leaders, from its own attorneys in the field or from the FBI"). As noted in one study of Section 5 enforcement, "[t]o counterbalance its lack of field staff, the voting section maintains a permanent registry of minority officials, minority group leaders, and other informed citizens to help evaluate the impact of a proposed voting change." *See* HOWARD BALL ET AL., *The View from Georgia and Mississippi: Local Attorneys' Appraisal of the 1965 Voting Rights Act, in* MINORITY VOTE DILUTION 190 (C. Davidson ed. 1984).

Most obviously, such a rule effectively makes the district court for the Southern District of Georgia the appellate reviewer of the Department's preclearance decisions. Under the jurisdictional scheme enacted by Congress, however, only the District Court for the District of Columbia may assess the validity of a Section 5 objection. 42 U.S.C. § 1973c; *see McCain*, 465 U.S. at 246-47 (jurisdiction to make Section 5 determinations rests exclusively with the Attorney General or the District Court for the District of Columbia); *McDaniel v. Sanchez*, 452 U.S. 130, 150-51 (1981) ("[t]he procedures contemplated by [Section 5] reflect a congressional choice in favor of specialized review - either by the Attorney General of the United States or by the United States District Court for the District of Columbia").[4] That jurisdictional restriction was no accident. Jurisdiction in the District of Columbia was intentionally prescribed in the Act to remove potential political pressures on judges in the identified discriminatory states, and to promote uniformity and centralization in decision-making under Section 5. *See, e.g.*, FRANK R. PARKER, BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965 29 (U.N.C. Press 1990) (citing difficulties of piecemeal litigation over voting rights abuses in southern states as impetus for Section 5). "[C]entralized review enhances the likelihood that recurring problems will be resolved in a consistent and expeditious way." *McDaniel*, 452 U.S. at 151 (footnote

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[4] Strictly speaking, even the District Court for the District of Columbia does not review the correctness of the Attorney General's Section 5 determinations, but instead determines *de novo* whether preclearance is warranted. *See Morris v. Gressette*, 432 U.S. 491, 505 & n.21 (1977).

omitted). As the Senate Report accompanying the 1975 extension of Section 5 noted, "The Attorney General and the United States District Court for the District of Columbia, as the experts in the area, have developed familiarity with the impact of discriminatory voting systems, and it is they who should assess the discriminatory impact of a system." S. REP. NO. 94-295, 94th Cong., 1st Sess. 19 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 785. For these reasons, as this Court held in *Perkins v. Matthews*, 400 U.S. 379, 385 (1971), "[w]hat is foreclosed to such [local] district courts is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General – the determination whether a covered change does or does not have the [proscribed] purpose or effect."

Furthermore, the district court's rule requiring states to prove the correctness of the Attorney General's Section 5 determination in local federal district courts thoroughly undercuts any notion of voluntary compliance with the Act. If every plan that includes a majority-minority district will be subject to second-guessing by the local district court, then the state might as well institute its own action challenging the Attorney General's determination first in order to save time and avoid potential disruption of elections. This undermines Section 5's purpose of providing an administrative preclearance route as a more efficient alternative to litigating preclearance in a district court proceeding. *McCain*, 465 U.S. at 246-47. Furthermore, under the district court's approach, recalcitrant jurisdictions would have a route to circumvent the Section 5 preclearance regime established by Congress – with

its concomitant burden of proof on the submitting jurisdiction. *Georgia v. United States*, 411 U.S. 526, 537-39 (1973). If a redistricting plan is blocked by the Department, the jurisdiction would no longer need to seek preclearance in the District of Columbia, but could simply await the filing of a local lawsuit by a disgruntled voter or candidate. The creation of such loopholes and opportunities for evasion has been strongly resisted by this Court. *See McDaniel*, 452 U.S. at 149 (holding that legislatively enacted redistricting plans must be submitted for Section 5 preclearance even when plan was enacted in response to federal court order, in part because contrary rule might encourage jurisdictions to evade Section 5 review process through involvement in local litigation).

In sum, so long as a state's or the Department's belief that a majority black district is necessary to avoid racial discrimination in the present or to remedy racial discrimination from the past or to comply with the Voting Rights Act, a state has a compelling justification to engage in race-conscious redistricting.

III. NARROW TAILORING ANALYSIS IN VOTING RIGHTS CASES SHOULD BE FLEXIBLE

The district court employed an incorrect legal analysis in holding that the Eleventh District was not narrowly tailored. The court failed to consider adequately the important differences between race-conscious redistricting and other types of race-conscious state action.

While there is guidance to be had from equal protection precedents in other contexts, voting rights cases are different because of (1) the nature of the alleged injury in

such cases and (2) the fact that voting is fundamental to government protection of rights in many areas other than voting and to confidence in the fairness of our political system overall. Voting rights cases involve group, not individual, injuries. *See Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994) (three-judge court). If one balances the amorphous potential injury to white voters (a very substantial majority in all fifty states) from race-conscious redistricting that does not dilute their group voting strength overall against the objective of achieving trust by blacks in an overwhelmingly white political system, this Court, we submit, should be lenient in allowing states considerable discretion in deciding how to draw district lines that permit effective political participation by minority citizens.

> "Voting is the preeminent symbol of participation in the society as a respected member, and equality in the voting process is a crucial affirmation of the equal worth of citizens." What is true of voting is also true of electing candidates of choice. Where the ability to elect such candidates is systematically denied, a group long frozen out of the political process is denied the full measure of citizenship that has long remained beyond its grasp.

QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990 16 (C. Davidson & B. Grofman eds., Princeton Univ. Press 1994) (quoting KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 94 (Yale Univ. Press 1989)). As former Attorney General William French Smith stated in congressional hearings on the extension of the Voting Rights Act of 1982:

> [I]t is imperative that we not lose sight of the fact that, while the Voting Rights Act was enacted in part as a prophylactic safeguard against racial discrimination in certain jurisdictions having a history of discrimination in voting, it had another and more critical purpose as well, which was forward-looking and constructive in nature. That purpose was to encourage States and localities to bring blacks and other racial minorities into the mainstream of American political life.

Hearings before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary on Bills to Amend the Voting Rights Act, 97th Cong., 2d Sess. 68-69 (1982).

Where, as here, the state is attempting to create enough majority-minority districts so that their percentage as against the total number of districts in the plan roughly approximates the percentage of minority voters in the state as a whole, the state is entitled to some leeway in drawing district lines. *Cf. De Grandy*, ___ U.S. at ___, 114 S. Ct. at 2658 & n.11 (endorsing the notion of proportionality between the number of majority-minority districts and the number of minorities in the relevant population as a rough proxy for the equality of political and electoral opportunity that the Voting Rights Act guarantees). To hold, as the district court effectively did below, that a majority black district is not narrowly tailored if the district line turns left at some point where the district court thinks it should have turned right, effectively arrogates to the district court the real power to draw district lines whenever an equal protection claim is at issue and essentially blesses court-created lines which will surely be perceived by blacks as discriminatory.

Such a rule is flatly inconsistent with this Court's well-established deference to the states, under principles of federalism, in districting decisions. As this Court has stated, "[i]f federalism is to operate as a practical system of governance and not a mere poetic ideal, .the States must be allowed both predictability and efficiency in structuring their governments." *Presley v. Etowah County Comm'n*, 502 U.S. 491, ___, 112 S. Ct. 820, 832 (1992). "[R]edistricting and reapportioning legislative bodies is a legislative task," *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978), which "deal[s] . . . with fundamental 'choices about the nature of representation' [and] is primarily a political and legislative process," *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973) (quoting *Burns v. Richardson*, 384 U.S. 73, 92 (1966)). Moreover, in truth, there is little risk of injury to white voters from such deference: overwhelmingly white legislatures are unlikely to discriminate against whites as a group; it will be the rare case where judicial protection of white voters is either necessary or appropriate.

Accordingly, any narrow tailoring analysis must properly take into account the states' broad discretion to draw district lines – including district lines that recognize and protect minority voting strength.

CONCLUSION

For the reasons stated above, the district court's judgment should be reversed.

Respectfully submitted,

NICHOLAS DEB. KATZENBACH*
906 The Great Road
Princeton, New Jersey 08540
(609) 924-8536

ALAN E. KRAUS
JEFFREY M. SIMINOFF
BARBARA L. FARRICKER
RIKER, DANZIG, SCHERER, HYLAND & PERRETTI
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981
(201) 538-0800

MICHAEL A. COOPER, Co-Chair
HERBERT J. HANSELL, Co-Chair
BARBARA R. ARNWINE
THOMAS J. HENDERSON
BRENDA WRIGHT
J. GERALD HEBERT
Lawyers' Committee for Civil Rights Under Law
1450 G Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 662-8600

**Counsel of Record*

Attorneys for Amicus Curiae Lawyers' Committee for Civil Rights Under Law

February 21, 1995